

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-4137

No. 77-4137

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATION SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

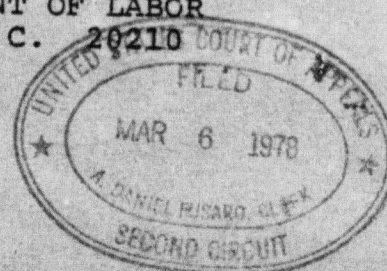
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BRIEF FOR THE SECRETARY OF LABOR

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether substantial evidence supports the Commission's finding that General Electric committed a serious violation of 29 CFR 1910.23(c)(1).

COUNTERSTATEMENT OF THE CASE

1. Nature of the case

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on petition of General Electric Company (General Electric) to review an order of the Review Commission issued against it on May 19, 1977. This

Court has jurisdiction under 29 U.S.C. 660(a), the cited violation having occurred in Schenectady, New York.

2. The Commission's Findings of Fact

The relevant facts are undisputed. General Electric Company is a New York corporation employing over 27,000 workers at its Schenectady, N. Y. worksite (225a-226a; 23a). ^{1/} On the Schenectady worksite is the small AC motor department ("SAC") which was inspected by OSHA compliance personnel in October 1974, where among other things the OSHA officers observed a bake oven used "to dry, and to remove the vapors and heat" from small AC motors after being dipped in varnish (35a). The top, or roof, of the oven stood approximately 10 feet 8 inches above a concrete floor (235a, 6a) and was about "twelve by twenty" feet around (39a, 81a, 151a). Located on the roof were two circulation and exhaust motors and related equipment necessary to operate the oven (235a). These two circulation and exhaust motors required routine maintenance such as "[w]elding, repairing belts,... putting belts on, chains, removing motors, [and] anything that deals with structural machines" (133a). Access to the motors is by means of a permanently affixed ladder on the right side of the oven, which had been placed there by the oven's manufacturer (235a; 178a). This ladder leads to a section of non-skid

^{1/} "A" references are to the Appendix. References preceding a semi-colon are to the Commission's findings of fact; those following to the supporting evidence.

grating which extends six feet north, away from the ladder. On the day of inspection, the length of this grating was guarded with a rail and toeboard (236a;179a). One of the motors is adjacent to this railing; the other motor is 10 to 14 feet from the end of the railing (235a; 138-142a).

During the two and a half years prior to the inspection, maintenance employee Anthony Perone had performed maintenance work on the roof of the oven "about four or five times" while his "partner" and electricians have also worked on the roof to perform maintenance chores (135a, 137a). Occasionally two persons were required to work on the roof at the same time when an electric motor had to be replaced (141a). Replacement of a motor required that maintenance employees work "right on the edge" of the roof (139a). Other maintenance task required employees work to within approximately one and a half to four feet from the edge (143a). It is undisputed that if an employee were to fall off the oven, he could suffer serious physical injury (236a). It is equally undisputed, however, that prior to October 1974, when the inspection had occurred, maintenance men were provided no protection whatever from falling from the top of the oven when working on the motors, with the exception that there existed a partial railing (rail and toeboard) noted previously. ^{2/}

^{2/} The partial railing was erected in August 1974 in response to a Union safety inspection report that referred to the un-guarded oven roof as a "cat walk" that needed guardrails (236 a).

3. Administrative proceedings

As a result of this inspection General Electric was issued a citation alleging inter alia a serious violation of 29 CFR 1916.23(c), the Secretary's standard for protection of open-sided floors, platforms, and runways. ^{3/} A penalty of \$500 was proposed. The company timely contested these citations and proposed penalties, 29 U.S.C. 659(c); the Secretary's formal complaint and the company's answer followed; and the case was heard on various dates in March and April 1975. At the hearing, the company contended that the top of the oven was not a "platform" within the meaning of 1910.21(a)(4), and therefore, not subject to the railing requirement of 1910.23(c)(1). It also contended that the Secretary failed to prove that a violation of the cited standard occurred within the six-month limitation period provided in section 9(c) of the Act. ^{4/}

^{3/} 29 CFR 1910.23(c)(1), the pertinent standard, provides in relevant part that "(1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing...on all open sides except where there is an entrance to ramp, stairway or fixed ladder." A "platform" is defined in 29 CFR 1910.21(a)(4) as "A working space for persons elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." A "serious" violation is deemed to exist if there is a "substantial probability that death or serious physical harm could result" from the violation's presence. 29 U.S.C. 666(j). In this case, the citation was originally issued as willful and/or repeated, see 29 U.S.C. 666(a). The Commission however, found only a serious violation, the Secretary has not appealed this determination, see 29 U.S.C. 660(b), and accordingly such issues are not before the Court. In addition petitioner was also issued 17 other citations for various alleged violations of the Act. However, none of these citations are before the Court.

^{4/} Section 9(c) of the Act, 29 U.S.C. 658(c) pertinently provides: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

On August 6, 1976, Judge Cronin issued a decision and order affirming the Secretary's citation (220). Commissioner Cleary timely directed review by the full Commission pursuant to 29 U.S.C. 661(i), and on May 19, 1977, that body affirmed its judge's findings (198a).

4. Decisions below

On the above record the judge affirmed the Secretary's citation, rejecting General Electric's contention that the top of the oven was not an elevated work "platform" within the meaning of the Act. In so holding, the Judge stated (243a-244a):

It reasonably may be argued that §1910.23(c)(1) should be interpreted to apply only to elevated working spaces, 4 feet or above ground level, which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance or repair work is performed. A majority of the Commission, however, has adopted a much more liberal, less restrictive, interpretation of the standard. Rather than applying the maxim of noscitur a sociis to the general definition of "platform" contained in §1910.21(a)(4) which would have produced a much narrower construction, the Commission in Secretary v. General Electric Company, Inc., supra (Docket 2739), gave the broadest possible meaning to the term "platform." Although not expressly defining "platform" the majority's opinion suggests that an elevated area on any structure constitutes a platform whenever work is required to be performed thereon and sufficient protection from an existing falling hazard is not provided.

The lower step of the oven top was designed to serve a dual function; to enclose the oven and to provide a location for the oven's motors and associated equipment. Although respondent's personnel are not required to go on top of this surface to operate the equipment,

occasional maintenance and repair work is required and the manufacturer affixed a permanent ladder on the oven's side to provide access to the equipment. The evidence further establishes that maintenance workmen have gone on this platform without any protection from falling. Applying the rationale of the Commission in the General Electric case, *supra*, to these facts, we are constrained to hold that the lower step of the oven top constitutes a "platform" as that word is defined in §1910.21(a)(4) and is thereby subject to the railing requirements of §1910.23(c)(1). [4/]

The judge held that the violation was "serious" within the meaning of the Act "because the possibility of a fall existed and serious physical injury could have resulted" (245a).

With respect to the company's statute of limitations contention the judge held that although "[n]o maintenance employees were observed on the oven top at the time of the inspection" or "proof of an employee's actual presence near the motors during the six-month period prior to issuance of the citation" except for one instance when a "catwalk railing" was installed, there was nevertheless a violation of the cited standard because (245a):

Their [employees] potential exposure to the hazard area...was constant; not only was the area accessible to maintenance employees, but more importantly, their assigned duties could reasonably be expected to bring them within the hazard area at any time. See, Brennan v. OSHRC & Underhill Construction Corp.

On review the Commission agreed with the judge that the company violated the Act, similarly rejecting the company's contention "that the guardrail requirements of 1910.23(c)(1) did not apply to the top of the bake oven involved" (202a).

4a/ See Secretary v. General Electric Co., OSHRC Docket No. 2739, 17 OSHRC 49, CCH 1974-1975 OSHD ¶19567 (1975), rev'd in part on other grounds, 540 F.2d 67 (2d Cir. 1976).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S
FINDING THAT GE COMMITTED A SERIOUS VIOLATION
OF 29 CFR 1910.23(c)(1)

1. As noted supra, in November 1974, the Secretary cited GE for a serious violation of 29 CFR 1910.23(c)(1) when an inspection revealed that petitioner had not erected railings around the top of a bake oven 11 feet above ground which also served as a work platform for the maintenance of two electric motors. Section 29 CFR 1910.23(c) pertinently provides that "every open-sided floor or platform four feet or more above adjacent floor or ground level shall be guarded by a standard railing ...on all open sides," and 29 CFR 1910.21(a)(4) defines a platform as "a working space for persons elevated above the surrounding floor or ground." The Commission thereafter affirmed the citation as serious and the Secretary's proposed penalty of \$500. The Commission's affirmance of the Secretary's citation is amply supported since it is undisputed that the platform was nearly 11 feet above the ground, it was not fully enclosed by guard-rails, and the maintenance employees were required to service electric motor housed on it. Thus as noted supra, maintenance employee, Anthony Perone, had personally performed maintenance chores on the motors housed on the platform on at least "four or five" occasions and has also observed his "partner" and other electricians working on the platform during the two and a half years he was assigned to that division. In these circumstances, the Commission properly determined that a

violation had occurred and its finding should be affirmed.

N.L.R.B. v. United Ins. Co., 390 US 254; Olin Const'n. Co. v. OSHRC and Brennan, 525 F. d 464 (C.A. 2, 1975); Brennan v. OSHRC and Underhill Const'n. Corp., 513 F.2d 1032 (C.A. 2, 1975).

2. The company does not dispute the aforementioned facts, but contends instead that there was no violation because (1) the top of the oven was not a platform within the meaning of the standard (Br. 11-18) and (2) there was no showing that a violation occurred within six months prior to the citation's issuance. As we show below, both contentions were properly rejected by the Commission. This platform is facially within the applicable definition of 1910.21(a)(4), that is, " a working space for persons elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment." The company in fact acknowledges (Br. 11) that "[i]t is undisputed that it [the oven roof] is for the performance of...repair or maintenance work on the oven's two motors." Furthermore, the Secretary's and Commission's interpretation is not only reasonable in light of the language of the standard, but also conforms with these agencies obligation to read this remedial act and standards promulgated under it in a manner which assures worker safety. See, GAF Corp. v. OSHRC and Dunlop, 561 F.2d 913, 915 (C.A.D.C., 1977); Southern Railway Co. v. OSHRC and Brennan, 539 F.2d 335,338 (C.A. 4, 1976), cert.

denied 97 S.Ct. 525; American Smelting and Refining Co. v. Brennan, 501 F.2d 504, 511 (C.A. 8, 1974). Here, the Secretary's and Commission's reading effectuates the obvious purpose of the standard by assuring that employees working on this platform are protected from a "serious" falling hazard--- precisely the danger to which the standard is addressed. Any other interpretation would leave maintenance workers on top of the oven without protection. This Court has consistently stated that "its role is to decide whether the Commission's interpretation of the regulation is unreasonable and inconsistent with its purpose...." Marshall v. Western Electric, Inc. and OSHRC 565 F.2d 240 (C.A. 2, 1977) quoting Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 1344 (C.A. 2, 1974). Here since the Commission and Secretary's reading is consistent with both the purpose of the standard and its language that reading should be affirmed. Cf. The Budd Co. v. OSHRC, 513 F.2d 201, 204-205 (C.A. 3, 1975); Clarkson Construction Co. v. OSHRC, 531 F.2d 451 (C.A. 10, 1976).

The company appears to contend that the standard should not apply simply because the roof of the oven did not function primarily as a working space. Not only does this appear irrelevant in light of its actual function, but it is apparent that the oven's designers intended the area to be a workspace since they permanently affixed a ladder to its side to facilitate access to the motors on top (40a, 235a).

Also without merit is petitioner's contention (Br.12) that "the regularity or frequency of employee presence" on the top of the oven bears on whether it is a platform within the meaning of the standard.^{5/} The short answer, of course, is that 21(a)(4) does not deal in terms of frequency or regularity, but ^{/is concerned only with} rather, whether the area is a working space for persons operating machinery or equipment elevated more than 4 feet above the ground. If an area meets that criterion as the oven here does, then it is a "platform" within the purview of 23(c)(1) irrespective of the frequency employees mount it; accordingly it must be protected by guardrails. Any other reading of the standard would simply deny employees protection without any persuasive reason for doing so. We also note that, contrary to GE's contentions, the Commission has consistently and repeatedly found such areas to be platforms in both identical and substantially similar circumstances. See U.S. Homes, Inc., Sandler-Bilt Division, OSHRC No. 307, 1971-73 CCH OSHD Para. 15,227 (1972); George A. Hormel and Co., OSHRC No. 1410, 1974-75 CCH OSHD Para. 18,685 (1974); Sibley Mill, Deering Milliken, OSHRC No. 8927, 1974-75 CCH OSHD Para. 19,733 (1975).

^{5/} Petitioner argues that since employees work on the top of the oven to perform "isolated and infrequent repair or maintenance ...on an irregular or unpredictable schedule," such presence is insufficient to "render it a 'work space' or 'platform' within the purview of §1910.23(c)(1)."

Thus in General Electric, supra, similarly at issue was whether stator frames, which are "large component parts of turbine generators that move through the plant on a wheeled frame with the capacity to be rotated to permit work to take place on all sides" and powered work platforms "that could be elevated to a height of ten feet," were "platforms" within the meaning of the standard, which would require standard railings or its equivalent. Holding that the definition of "platform" in 21(a)(4) "applies as a matter of plain meaning," the Commission held that a broad definition of the term was imperative since

...the purpose of the Act is to protect the health and safety of workers. This purpose is not well served by reading a standard in a manner that detracts therefrom. Here, this purpose is best served by a broad construction of the word 'platform' in the standard.

The Commission's finding, therefore, that ^{the} top of petitioner's oven was a work platform within the meaning of the Act is supported by substantial record evidence and in conformity with consistent Commission precedent, and should be affirmed forthwith. ^{6/}

6/ While the company contends (Br.15-17) that the instant case is inconsistent with a number of prior Commission decisions the cases cited by the company are all distinguishable. In Arizona Public Co., OSHRC Docket No. 329, CCH 1971-1973 OSHD ¶15131 (1972), the top of a transformer was found not to be a "platform" because uncontroverted testimony indicated that the employer owned many transformers of the type involved, that the tops of most of them never required work to be done on them, and that therefore the necessity for work on the involved transformer could not have been foreseen.

(continued)

3. For many of the reasons just noted, the court should reject the company's contention (Br. 15-25) that section 1910.23(c)(1) is unconstitutionally vague "on due process grounds when applied to the top surface of the bake oven." In considering a vagueness challenge under the Act, it is critical to take into account that these regulations "involve civil legislation in contradistinction to criminal legislation," and that "rights guaranteed by the first amendment are not remotely related,...hence, [the court should] consider the statute not only in terms of the statute 'on its face' but also in light of the conduct to which it is applied." Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (C.A. 5, 1974) quoting United States v. National Dairy Corp., 372 U.S. 29, 36. And in making a determination as to whether §1910.23 is vague "in light of the conduct to which it is applied," it makes no difference that the provision may not be a "model of perfect precision" because, as stated in Ryder, supra, the regulation appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury."

(footnote 6/ continued)

Moreover, the record evidence indicated that the erection of a railing might have been more hazardous than working on the top without a railing. In the instant case, however, it is undisputed that work was performed on the platform over this and other ovens on a routine basis, thereby removing this case from the ambit of Arizona. In addition, there is no contention that installation of railings was hazardous because petitioner, at the insistence of the union, erected a partial railing with no difficulty. Similarly Allis-Chalmers Corp., OSHRC Docket No. 5210, 1975-76 CCH OSHD ¶20666 (1976) offers little support to petitioner since it merely held "that the surface of a product while it is being manufactured, assembled and tested is not a platform as defined in §1910.21(a)(4)" (¶24,750). Petitioner's oven was neither being manufactured, assembled or tested, and accordingly falls without the Allis-Chalmers decision.

Rather, so long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster. Ryder Truck Lines v. Brennan, 497 F.2d at 235. Finally, any indefiniteness such requirements contain may be cured through existing interpretations of the terms or the chance to obtain an interpretation by the agency charged with their enforcement. E.g., Seagram v. Hostetter, 348 U.S. 35, 48 (1966); Jordan v. Degeorge, 314 U.S. 223, 227 (1951).

Based upon these criteria, the standard is clearly not vague. Not only, as we have previously noted, does the top of the bake oven and its use fit within the definition of platform contained in 21(a)(4) but in this case petitioner had prior knowledge that the term "platform" had been broadly interpreted by the Commission to cover, with the exception of certain narrowly defined situations, all work areas elevated more than 4 feet above the ground. Thus, the company had been previously cited for two such violations that ultimately resulted in a Commission decision on the same regulation and issue of applicability.

Moreover, the union had in effect apprised the company of its view that this was a platform when it requested the company to place a railing near the motors (supra, n.6). In short, this regulation as applied here is not vague because these are facts that should have placed petitioner on notice as to what the Act proscribed, and the regulation itself afforded reasonable notice to the petitioner of what was expected of it in view.

of common understanding and practices. It passes constitutional muster. McLean Trucking Co. v. OSHRC, 503 F.2d 8, 11 (C.A. 4, 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (C.A. 5, 1974); United States v. Petrillo, 332 U.S. 1, 4 (1947)..

4. Finally, the company vigorously contends (Br. 25-29) that no violation of 1910.23(c)(1) occurred within the six-month limitations period as provided in section 9(c) of the Act.^{7/} This contention is without merit. Thus, while the record indicates that no employees were observed working on the platform over the oven at the time of inspection, it is undisputed that several employees were required to mount it to perform maintenance and repair work on the two electric motors. In these circumstances, the judge found there was a violation since "[petitioner's employees] potential exposure to the hazard area...was constant; not only was the area accessible to maintenance employees, but more importantly, their assigned duties could reasonably be expected to bring them within the hazard area at any time," (245a). This determination was correct.

^{7/} Section 9(c), 29 U.S.C. §658(c), provides:

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

In Underhill Construction Corp., supra., this Court held that where "an employer is in control of an area, and responsible for its maintenance," to prove a violation the Secretary "need only show that a hazard has been committed and that the area of the hazard was accessible to employees." 513 F.2d at 1038. The Court further elaborated upon what constituted access, noting that (id. at 1039):

"What we have said meets [Dic-Underhill's] additional arguments, made in respect to the three perimeter guardrail violations of 29 CFR §1926.500(d)(1), that as to the first only the field engineers were "checking targets" (and had to lean out over the edge of the building to do so) and no other employees were seen, that as to the second only one man (though a Dic-Underhill employee) 15 feet away from the edge and not in danger of falling, was observed; and as to the third the two men using the ceiling sanding machine were 10 feet from the edge and hence not exposed. One takes it that Dic-Underhill would have us hold that for a citation properly to issue an employee of a particular employer creating the perimeter hazard must be seen by an inspector teetering on the edge of the floor 150 feet or so up from the ground. No such interpretation of the standards would be reasonable. No such interpretation is consistent with, let alone called for by, the Act.

As in Underhill, the instant case presents a hazard - the unguarded platform - which was accessible to employers. Indeed, this case is even stronger since the evidence is that maintenance employees were required to work on the platform whenever the electric motors needed maintenance repair. Therefore, petitioner comes within the rule of Underhill and is accordingly in violation of 1910.23(c)(1).

The result here also follows from the Court's decision in *Usery v. Marquette Cement Manufacturing Co.* and OSHRC, --- F.2d--- (C.A. 2, 1977), 3 CCH ESHG Para. 20,099. There the Court in finding a violation of section 5(a)(1) of the Act stated (3 CCH ESHG at p. 26,622):

The ALJ and the Commission also relied on the absence of evidence of Rysavy's reason for being in the alleyway, and intimated that the Secretary was required to prove that the alleyway was used as a passageway or that employees were assigned to work there. On the contrary, it is sufficient that employees had access to the alleyway, situated as it was between buildings in which employees worked. See *Underhill*, *supra*, 513 F.2d at 1038-39. Even if a hazard is partially caused by an employee's own conduct, the employer is responsible if he could have prevented it. *National Realty*, *supra*, 489 F.2d at 1266 & n. 36. Here the serious nature of the harm that could result if an employee were to wander into the alleyway during kiln relining warranted precautions against even the slightest possibility of its occurrence, especially when the simple precaution of placing a sign or barricade outside the alleyway would have been effective.

Obviously, if employers are required to take precautions against hazards in places to which employees have access and might "wander", a fortiori employers must take precautions where employees' access is a certainty because of their jobs' requirements. Finally, the Commission's determination is the only one consistent with the legislative history,^{8/} and the repeated holdings of this and

^{8/} Committee Print, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92d Cong. 1st Sess. (1971) at 853.

other Courts that "the keystone of the Act, in short, is preventability." Brennan v. OSHRC and Underhill, supra, 513 F.2d at 1039, and cases therein cited.

Petitioner can seek no solace from this Court's General Electric decision. That case involved a powered platform with detachable guardrails. When the inspection was conducted it was without guardrails. However, there was testimony from a union representative that the platform had been used "at heights of six to eight feet without guardrails," and from the employer that it was "used (with guardrails) approximately once a month." As this court noted, in finding a violation "The Commission combined evidence of recent use with evidence of non-complying use to reach a conclusion of recent non-complying use." 540 F.2d at 70. This was insufficient, the court determined, since "there simply is no evidence that the platform was used without guardrails during the preceding six months, much less that it was used during that period at a height of more than four feet, as specified in the standard." Id. at 70. Thus, there was no evidence that the platform was operated without guardrails during the limitations period. There is no such determinative factual question here, since the cited oven never had guardrails and employees had access to the oven top throughout the limitations period. Moreover, in General Electric, supra, this court specifically noted that it would not decide whether access to the hazard was sufficient because (id./70, n. 3)

"...the Commission explicitly declined to rest decision on a theory of employee exposure to the risk of using an available

but unsafe piece of equipment....[and] we confine our review of the Commission's order to the validity of the ground upon which the agency entered its decision."

Here in contrast the Commission relied on an "exposure to risk" theory consistent with the Court's decisions in Marquette and Underhill. The violation findings should be affirmed.

CONCLUSION

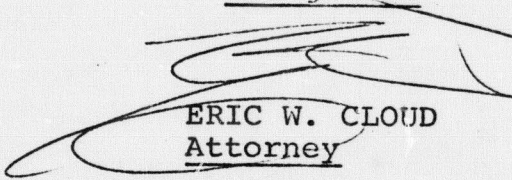
For the reasons stated, an order should issue affirming the Commission's decision and denying the petition for review.

Respectfully submitted,

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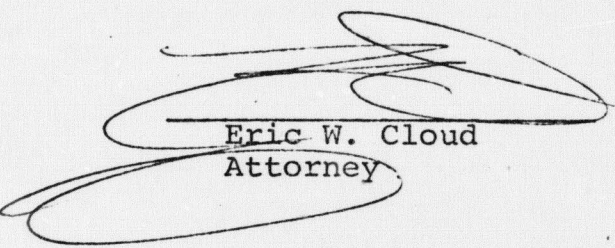
U. S. DEPARTMENT OF LABOR
Washington, D. C. 20210
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FEBRUARY 1978

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief
were served this day of February 1978, by appropriate
mailing, postage prepaid, on the following counsel of record:

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